Petition

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81-2058

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

HERITAGE HOMES OF ATTLEBORO, INC.,
PETITIONER,

v.

THE SEEKONK WATER DISTRICT,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Is a municipal corporation which engages in a persistent course of blatant racially discriminatory legislative activity immune from punitive damage liability under 42 U.S.C. § 1981?
2. Can a blatant and persistent course of racially discriminatory town meeting action taken by a municipal corporation's duly authorized taxpayers subject the municipal corporation to punitive damage liability under 42 U.S.C. § 1983?

Parties Below.

At an earlier stage of this case Roger G. DesVergnes, Barbara R. Mann, Harold G. Devine, Jr., and Paul R. Tortolani were additional parties. The only parties remaining at the time of the trial and judgment sought to be reviewed are those listed in the caption to this petition. Heritage Homes of Attleboro, Inc. has no parent company and no subsidiary.

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RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinions of the district court were reported at 448 F. Supp. 1256 (1978); 463 F. Supp. 686 (1979); and 498 F. Supp. 463 (1980). The opinions of the court of appeals were reported at 601 F.2d 9 (1979); 648 F.2d 761 (1981); and 670 F.2d 1 (1982). The last opinion of the district court and the last two opinions of the court of appeals are reproduced in the Appendix.

Jurisdiction.

The judgment of the court of appeals was entered on January 25, 1982 and this petition was filed within ninety days of that date. Jurisdiction in this Court is founded on 28 U.S.C. § 1254(1). Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343.

Statutes Involved.

United States Code, Title 42

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

In this civil rights action brought by the petitioner, Heritage Homes of Attleboro, Inc., under 42 U.S.C. §§ 1981 and 1983, the complaint alleges that the Seekonk Water District denied Heritage's request to have its proposed housing development included in the water district with the intent to discriminate against black persons and to punish Heritage for its willingness to sell houses to black persons. Both damages and injunctive relief are demanded.

The district court dismissed the complaint for failure to state a cause of action. 448 F. Supp. 1256; 463 F. Supp. 686. The court of appeals reversed and remanded the case to the district court. 601 F.2d 9.

Heritage is a Massachusetts corporation engaged in the development of low priced single family housing. In early 1976, Heritage became interested in purchasing and developing a 150 acre parcel of land in Seekonk, Massachusetts. The land abutted the boundary of the Seekonk Water District.

The water district is a municipal corporation created by a special act of the Massachusetts legislature and consists of the inhabitants of the town of Seekonk liable to taxation who reside within specified geographic limits. It was created for the purpose of supplying the inhabitants with water for fire protection, domestic and other purposes. Only part of the town is included within the water district; however, land within the town abutting on the district may be included upon the petition of its owner and the majority vote of the water district's voters present at a duly called meeting.

Before purchasing the real estate, Heritage inquired of the water district's officials as to the possibility of obtaining water for its proposed development. The officials informed Heritage that the chances of inclusion were very good; that the application procedure was just a formality; that the water

district already had plans to extend its boundaries past that area to straighten the boundary and to improve the distribution system; and that there was no shortage of water in the district. Heritage's development of the land would relieve the water district of approximately $20,000 it would otherwise have to spend to put pipes through the area.

In April, 1976, Heritage purchased the land which had street frontage of 3,900 ft. on four streets. There were eight building lots already laid out and twenty-two more frontage lots could have been laid out and built upon without subdivision approval. In addition, there were potentially 114 back lots requiring subdivision approval. Shortly after the purchase, Heritage applied to the water district for inclusion and on May 1, 1976, began performing percolation tests required for the approval of the on-site septic systems for the thirty frontage lots.

In 1976, the town of Seekonk had a population of 13,500. It was predominantly white with only five to fifteen black residents. The adjoining city of East Providence, Rhode Island had a black population which was close to forty percent. Abutting the Heritage parcel, but within the water district boundary, was an existing ten to twelve year old development known as Fieldwood consisting of approximately 100 houses. About the time the percolation tests were being performed, residents of Fieldwood began calling the building inspector to complain that the Heritage development would be low income federally subsidized housing and would bring in blacks and Hispanics. The callers asked what he was going to do to slow down the development. The town selectmen also received a great many calls from Fieldwood people complaining that Heritage's development would bring undesirable people into town.

In the past, Heritage had built a low priced housing development in a neighboring white community and had sold

houses in that development to blacks. The selectmen asked Heritage not to build the type of houses it had built in the neighboring community because that type of house would bring in black people who were not wanted in Seekonk. One of the selectmen said that they did not want all of the blacks and Puerto Ricans in East Providence moving into the neighborhood. At about this time, and continuing for a five week period, Heritage received malicious telephone calls threatening to burn the houses as fast as they were built.

Meetings of the water district are called by a warrant which states the purpose of the meeting and warns the voters to attend. On May 11, 1976, there was a duly called water district meeting. One of the warrant articles was Heritage's petition for inclusion. In conversations, the voters expressed concern that the development would bring in black people from nearby East Providence and that this would devalue their homes. During the floor discussion on the article it became apparent that many of those present had come for the sole purpose of defeating it. Speakers referred to the proposed houses as low income housing and shacks and one speaker said the houses would bring blacks into the area. Immediately after defeating the Heritage article the voters left the meeting and went to a concurrent planning board meeting considering a routine building permit application filed by Heritage. One of the voters from the water district meeting exclaimed to others present at the planning board, "if we don't stop this here tonight . . . you will have all the niggers in town." The meeting was crowded beyond capacity and there was difficulty keeping order.

After the first defeat at the hands of the water district voters, Heritage applied three more times over the next two years and was voted down each time. The water district's refusal to supply water delayed the development of the thirty frontage houses for two years and forced Heritage to drill

individual wells for each house. The lack of access to the municipal water system prevented Heritage from obtaining subdivision approval, completely blocking the development of the 114 back lots. In all, Heritage was only able to build thirty houses, one of which it sold to a black family.

After a non-jury trial the district court found, "based on *overwhelming* evidence" that the water district's refusal to supply water to Heritage had been motivated solely by racial considerations and assessed $100,000 in punitive damages against the water district in order to discourage its obvious policy of racial discrimination and as a warning to others. The court of appeals affirmed, reasoning that the odious character of the deliberate and remarkably overt display of racial discrimination justified the invasion of the public purse in order to punish blatant discrimination resulting from open governmental participation.

While the water district's petition for certiorari was pending, this Court decided the case of *City of Newport v. Fact Concerts, Inc.*, __ U.S. __ (1981). Thereafter, this Court vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Fact Concerts*.

On remand the court of appeals ruled that because Heritage was harmed by the vote of a small group of taxpayers rather than by widespread participation, this Court's holding in *Fact Concerts* precluded municipal punitive damage liability under 42 U.S.C. § 1983. The court of appeals further ruled that history and policy support a similar immunity under 42 U.S.C. § 1981. For these reasons the court of appeals reversed the punitive damage judgment.

Reasons for Granting the Writ.

The petition should be granted because the court of appeals has decided issues of municipal immunity under 42 U.S.C.

§ 1981 not decided by this Court. The court of appeals decision has extended to § 1981 the principles of municipal immunity for punitive damage liability under § 1983 decided by this Court in the *Fact Concerts* case. This extension is contrary to a construction of § 1981 liability long established in the lower federal courts. Any change in such a basic and well established policy should be made by this Court.

In *Fact Concerts* this Court's holding that municipalities are immune from punitive damages under 42 U.S.C. § 1983 was based upon considerations of that statute's history and policy. It was found that § 1983's history and policy did not support exposing a municipality to punitive damages for the bad faith actions of its officials. This Court found that by 1871 when § 1983's predecessor was enacted, municipal immunity from punitive damage liability was firmly established at common law; that the policy behind this immunity was the desirability of avoiding the placement of the burden of punitive damage awards on blameless taxpayers; and that this policy was not inconsistent with the legislative history of the 1871 Act which contained the debates on the Sherman Amendment including the statement that punishment of municipalities was not intended.

This case involves 42 U.S.C. § 1981 which is derived from the Civil Rights Act of 1866 having a very different history and policy from § 1983 and involves racially discriminatory town meeting legislative action taken by taxpayers rather than action taken by municipal officials.

The state of the law of municipal immunity under 42 U.S.C. § 1983 has developed quite differently from that of § 1983. During the seventeen years between *Munroe v. Pape*, 365 U.S. 167 (1961) and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) while it was held that municipalities were absolutely immune from liability under § 1983, lower courts, based upon differences in the construction and

history of § 1981, held municipalities liable under that section. *Sethy v. Alameda County Water District*, 545 F.2d 1157 (9th Cir. 1976); *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976); *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974); *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977); *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Robinson v. Conlisk*, 385 F. Supp. 529 (N.D. Ill. 1974); *United States ex rel. Washington v. Chester County Police Department*, 294 F. Supp. 1157 (E.D. Pa. 1969); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908; *Milburn v. Girard*, 441 F. Supp. 184 (E.D. Pa. 1977); *Hines v. D'Artois*, 383 F. Supp. 184 (W.D. La. 1974), *reversed on other grounds*, 531 F.2d 726 (5th Cir. 1976).

This extensive and ingrained history of different treatment of municipal immunity under § 1981 from that which existed under § 1983 prior to *Monell* sets the stage for different treatment of municipal immunity under the two sections after *Fact Concerts*. Although the court of appeals in this case has adopted by rote this Court's § 1983 reasoning, other courts have already begun to look past *Fact Concerts* to the pre-*Monell* treatment of municipal immunity under § 1981. *Boyd v. Shawnee Mission Public Schools*, 522 F. Supp. 1115 (D. Kan. 1981). This case presents the opportunity to decide an important issue of municipal immunity which already divides the lower courts.

Contrary to the remand opinion of the court of appeals there are strong reasons based on history and policy for treating municipal punitive damage liability differently under § 1981 than under § 1983. In 1866, when § 1981's predecessor was enacted by the 39th Congress, municipal immunity from punitive damage liability was much less than universally

established. At that time, there were lines of cases on both sides of the issues.[1]

Unlike the Civil Rights Act of 1871, which applied to a broad range of constitutional deprivations, the Civil Rights Act of 1866 was restricted to racial discrimination at the core of basic liberties, the rights to contract, to own property, to sue, to be a witness, and to equal security of person and property. The limitation of the 1866 Act to racial discrimination has very significant historical implications. Racial equality was the subject and primary focus of the abolitionist movement. The anti-slavery societies formed in the early 1830's were established with the stated purpose of not only abolishing slavery but also of obtaining civil and religious privileges for the blacks. J. tenBroek, *Equal Under Law* at 33 (Collier Books Ed. 1965) (hereinafter cited as tenBroek).

Between 1830 and 1860 the movement transformed its efforts from proselytizing to intensified political action and sectional struggle for control of the federal government and national power. tenBroek, at 35. The Civil War transformed its spokesmen from fanatics to influential and respected leaders of the radical wing of the Republican party. It was the influence of the abolitionists through the Republican party which was able to utilize the military pressures of the war and the political pressures of reconstruction to emancipate the

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[1] *Whipple v. Walpole*, 10 N.H. 130 (1839) and *Wheeler v. Troy*, 20 N.H. 77 (1849) held that there was liability. *Wallace v. Mayor etc. of New York*, 18 How. 169, 176 (N.Y. Sup. 1859) suggested that there might be. While *M'Gary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846); *Order of Hermits of St. Augustine v. County of Philadelphia*, 4 Clark 120, Brightly N.P. 116 (Pa. 1847) and *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858) held that there was no liability. It wasn't until after 1866 that the New Hampshire cases were overruled, *Woodman v. Nottingham*, 49 N.H. 387 (1870), and other no liability cases were decided, *City of Chicago v. Martin*, 49 Ill. 241 (1868); *City of Chicago v. Langlass*, 52 Ill. 256 (1869).

slaves, employ black soldiers in the Union Army, create and enlarge the powers of the Freedmen's Bureau and adopt constitutional amendments and laws for the political and civil equality of blacks. *Preface* to J. McPherson, *The Struggle For Equality*, at vii (1964) (hereinafter cited as McPherson). The Civil Rights Act of 1866 was born at the apex of the abolitionist efforts and influence. By 1870, for all practical purposes, American abolitionism had come to an end. The Act of 1871 was born of a time when military and political necessity for black equality was fading and the North was sliding back to apathy. McPherson, at 430-31.

At the time the 39th Congress convened, the war had recently ended in a military victory for the North and the Thirteenth Amendment had just been adopted; however, the rebel governments were embarked on the enactment of legislation designed to nullify the abolition of slavery and therefore the Northern military victory. McPherson, at 335. The Southern black code laws provided that freedmen's children could be put out to indenture by county judges, that any freedman who refused to work at low wages set by county judges could be bound out for a period of years at even lower wages; that freedmen could not sue whites for their wages; that freedmen could not testify against whites; that freedmen could not serve on juries; and that freedmen were to be punished more harshly for crimes than whites. *Cong. Globe*, 39th Cong., 1st Sess. 588-89 (hereinafter cited as *Globe*). The 1866 Act was conceived as a means, among other things, of eradicating affirmative governmental action which discriminated on the basis of race. tenBroek, at 180. The 1871 Act on the other hand was directed primarily at passive governmental failure to enforce adequate state laws. *Munroe v. Pape*, 365 U.S. 167, 174-76 (1961). The military and political necessity to maintain the Northern victory, the broad popular acceptance of the abolitionist ideals of racial equality and the blatant and open discrimination by Southern

governments all formed a logical basis for the stronger enforcement measures contemplated for the 1866 Act than those contemplated for the enforcement of the broader 1871 Act.

The 39th Congress considered several proposals for insuring the freedmen the liberty promised to them by the Thirteenth Amendment. These were rejected as half measures in favor of two bills introduced by Senator Trumbull which later were enacted as the Civil Rights Act of 1866 and the Amendment to the Freedmen's Bureau Act of 1866. tenBroek, at 175-77. Both contained the same operative language in their declarations of basic liberties which cannot be denied on the basis of race. *Id.* at 178.

The very strongest methods for enforcement were employed in the two 1866 Acts. The Civil Rights Act of 1866 was framed in terms of the Fugitive Slave Law which had long been viewed by abolitionists as most onerous. *Id.* at 58; *Globe*, 601. It also authorized the President or his delegate to employ the land and naval forces of the United States or the militia to enforce the Act. Act of April 9, 1866, c. 31, § 9, 14 Stat. 27. Even marshalls and deputies were authorized in Section 5 to call the military to their aid to enforce the Act. The Amendment to the Freedmen's Bureau Act of 1866 placed the Freedmen's Bureau under military protection, established military tribunals to hear cases involving blacks in the rebel states, did away with appeals, writs of prohibition, trial by jury and the usual rules of proceedings in cases heard by the military tribunals. Act of July 16, 1866, c. 200, 14 Stat. 173.

Although the Civil Rights Act of 1871 authorized the President to call out the military to suppress insurrections and domestic violence, it did not give anyone the power to call out the military for the Act's general enforcement. Act of April 20, 1871, c. 22, § 3, 17 Stat. 13. The most extreme means of

enforcing the provisions of any prohibition is at the point of a bayonette. It is reasonable to expect that an Act which employs this extreme method of enforcement might also encompass the relatively benign enforcement method of municipal punitive damage liability. Moreover, it is clear from Senator Trumbull's response to President Johnson's veto message that the Civil Rights Act of 1866 provided no deference or traditional immunities for legislators who might enact racially discriminatory laws.[2]

The outrage of racial discrimination usually does not result in significant pecuniary loss to the victim. For this reason, punitive damages assume a very important role under § 1981. By extending municipal immunity for these damages, the court of appeals has greatly diluted § 1981's ability to discourage blatant governmental racial discrimination contrary to the history and policy of that statute.

The second important issue presented is the propriety of the court of appeals' expansion of § 1983 municipal punitive damage immunity to direct taxpayer action. In this Court's *Fact Concerts* analysis of the policy considerations underlying punitive damages assessed against municipalities under

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[2] After he vetoed the original bill, the President returned it to the Senate with his written objections. *Globe*, 1679-81. One of the provisions objected to was § 2 which, in his view, deprived state legislators of their traditional immunity by making them liable as an official offense should they vote for laws conflicting with the rights secured by the bill. *Globe*, 1680. Senator Trumbull responded by stating that it was not the mere making of the law that was to be punished but it was the doing of any act that deprives another of a right he is entitled to or subjects another to some punishment he ought not to bear. He asserted that the invasion of legislative immunity was essential to combat the widespread enactment and enforcement of black code legislation in southern states. *Globe*, 1758-79. He assured the Senate that the bill "in no manner interferes with the municipal regulations of any state which protects all alike in their rights of person and property." *Globe*, 1761.

42 U.S.C. § 1983, the punishment justification was found to be lacking in situations where punitive damages are assessed against a party who took no part in the wrongful conduct. In finding that the retributive purpose is not advanced by exposing municipalities and their "blameless or unknowing taxpayers" to punitive damages, this Court acknowledged the inapplicability of this reasoning to the situation where the taxpayers are themselves responsible for the wrongful conduct. *City of Newport v. Fact Concerts, Inc.*, U.S. at n.29 (1981).

The wrongful conduct considered by this Court in *Fact Concerts* was that of a city council. The wrongful conduct in this case was that of a majority of the water district voters present and voting on four successive occasions. This conduct was, apart from its municipal character, found by the court of appeals to have been "sufficient to support the award of punitive damages" and a "classic case for the consideration of punitive damages."

Section 13 of Mass. St. 1945, c. 381 places the authority to enlarge the territory of the water district in the hands of "a majority of the voters present and voting." In this aspect, considering that the voters are the inhabitants of the Town of Seekonk liable to taxation and residing within the water district, they are acting as a town meeting, a unique New England concept. There is a very significant difference between town meeting action and action taken by a city council. Town meeting action is the will of the collective individuals, while city council action is the will of their representatives. Town meeting action is direct, city council action is representative. *In Re Opinion Of The Justices*, 229 Mass. 601, 609 (1918); *Wood v. Milton*, 197 Mass. 531, 532-33 (1908).

The gross numbers of the votes cast for and against the Heritage articles are of little importance. The entire taxpaying body was warned to attend. In spite of the court of

appeals speculation, there was no evidence that the number of taxpayers was disproportionately large in comparison to those who came to vote. The important fact is that the majority vote of those who did come to vote constituted the action of all the taxpayers. Contrary to the reasoning of the court of appeals, punitive damages assessed against all the taxpayers would serve to deter this type of racial discrimination in the future. If the water district taxpayers want to avoid being punished for the actions of a small claque of voters, they can either take appropriate steps to place the decision of important questions in the hands of elected representatives or take a more active interest in the meetings of their water district.

Conclusion.

The court of appeals' extension of municipal punitive damage immunity to § 1981 should be considered by this Court because such an immunity is at odds with the history and policy of the Civil Rights Act of 1866. The issue of extending such immunity under § 1983 to direct taxpayer action should also be considered because that very important issue was left undecided in *Fact Concerns.* For these reasons, this petition should be granted.

Respectfully submitted,

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Appendix

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT.

Civ. A. No. 77-1251-C.

United States District Court,
D. Massachusetts.

Sept. 3, 1980.

Michael J. Duggan, Stephen D. Clapp, Armstrong, Pollis & Clapp, North Attleboro, Mass., for plaintiff.

William E. Hickey, Quincy, Mass., John J. Grahan, Boston, Mass., for Seekonk Water District.

Alvin Jack Sims, Brockton, Mass., for Barbara R. Mann.

Larry Kenna, Lawrence B. Litwak, Choate, Hall & Stewart, John A. Nadas, Boston, Mass., for defendants Devine and Tortolani.

MEMORANDUM

CAFFREY, Chief Judge.

After remand this matter came before the Court for further proceedings.

In 1977 a three count complaint was filed by plaintiff Heritage Homes and its president, Roger DesVergnes, against the Seekonk Water District (the District) and three individual defendants. The complaint alleged that Heritage Homes' application for inclusion of its land in the Seekonk Water District was denied by the District with the intent to discriminate against black or low income persons in violation of 42 U.S.C. §§ 1981, 1983, 1985(3) and the thirteenth and fourteenth amendments of the United States Constitution.

In its orders of April, 1978 and January, 1979 this Court dismissed the complaint and the amended complaint for failing to state a cause of action *DesVergnes v. Seekonk Water District*, 448 F. Supp. 1256 and *DesVergnes v. Seekonk Water District*, 463 F. Supp. 686. After an appeal was filed the three individual defendants were dropped from the suit leaving only the District as appellee. The Court of Appeals affirmed the judgment of dismissal as to DesVergnes on all counts and as to Heritage Homes on Count II. However the Court ruled that Heritage Homes had stated a claim against the District under 42 U.S.C. § 1983 (Count I) and also under § 1981 (Count III), *DesVergnes v. Seekonk Water District*, 601 F. 2d 9 (1979).

In its decision the Court of Appeals ruled (1) that the complaint set forth a "case or controversy" within the meaning of Article III; (2) that Section 1981 creates an implied right of action for Heritage Homes against any person who with racially discriminatory intent injured it because it had contracted with black persons in the past; (3) that Heritage Homes also has standing under Section 1983 because a State may not discriminate against a corporation for its willingness to contract with blacks, (4) that a municipal corporation such as the District could be held liable under both Section 1981 and Section 1983, and (5) that the District's liability under Sections 1981 and 1983 could be premised on a vote of the

voters of the District because a majority vote could fairly be said to represent official policy.

On the basis of the foregoing rulings the case was remanded and further proceedings consisting of a two day nonjury trial were held. I find and rule as follows.

LIABILITY

Plaintiff Heritage Homes is a corporation engaged in the business of real estate development. Its president and sole shareholder is Roger DesVergnes. At some time prior to February, 1976 Heritage Homes became interested in developing approximately 150 acres of land in Seekonk, Massachusetts known as Pritchard Farm. Although plaintiff envisioned the ultimate development and sale of about 145 lots, the development and sale of only 30 homes would make the land purchase economically feasible.

I find that the plaintiff's acreage abutted the Seekonk Water District and that in February, 1976 prior to the purchase of the property Roger DesVergnes went to the Water District office and met with the District's Superintendent Roger Wilbur. DesVergnes later had a second meeting with Wilbur and several water commissioners. At both meetings the possibility of including plaintiff's land in the Seekonk Water District was discussed. DesVergnes was advised that Heritage Homes could not apply for inclusion in the District until it purchased the property but that there was no water shortage and that the District had hoped to extend the main water line in the direction of the Pritchard Farm as part of its normal expansion.

In April, 1976 plaintiff purchased the property for three hundred thousand dollars. It paid fifty thousand dollars in cash and financed the balance with a purchase money mortgage from the Taun[illegible] Cooperative Bank. The land included

eight house lots on Miller Street for which no Planning Board approval was required under the subdivision control law.

On the other side of Miller Street there was a subdivision known as Fieldwood Estates which at that time contained one hundred houses and now contains between one hundred twenty-five and one hundred fifty homes. Fieldwood Estates was in the Water District.

Shortly after the purchase Roger DesVergnes returned to the water district office to apply for inclusion of plaintiff's land in the Water District. At that time he discussed with the Superintendent the appropriate method of extending the main water line and the distribution of costs incident to that extension. The Superintendent stated that the extension would benefit the District, improve water pressure in the Fieldwood Estates development and reduce taxes. DesVergnes was also informed that inclusion in the Water District was not necessary for seven of the lots on Miller Street upon which Heritage Homes intended to build because as to those lots plaintiff would be allowed to tap into the existing main just as three other houses on the same side of Miller Street had done.

On May 1, 1976 percolation tests were performed on thirty of plaintiff's street lots. Present on the property that day were the Seekonk Building Inspector, two Seekonk Selectmen and the real estate broker who had an exclusive sales contract for the proposed development. One of the two selectmen was present because he had received phone calls from members of the community expressing concern that Heritage Homes intended to build low income housing on the property or concern that HUD financing would be available to purchase the proposed houses. The callers were afraid that a lower class of people or undesirable people would be attracted to Seekonk as a result of the project.

Mr. DesVergnes took the two selectmen to North Attleboro to show them a development of homes identical to those planned for the Seekonk acreage. The selectmen told him that they did not want Heritage Homes to continue with its Seekonk project because it would attract blacks and Puerto Ricans from East Providence to Seekonk.

Between May 1 and May 11, 1976, the Building Inspector received nine or ten telephone calls from people he knew to be residents of Fieldwood Estates in which he was informed of a rumor that plaintiff planned to build HUD housing for low income families and that such a development would attract blacks and Hispanics to Seekonk. The callers asked what the Building Inspector planned to do to slow down the development.

At the same time Roger DesVergnes began getting threatening phone calls in which he received warnings not to continue with the development and threats that it would be burned down.

On May 11, 1976 a water district meeting was held. Included on the agenda for the meeting was Article 17, a motion to include the property of Heritage Homes in the Water District, and Article 18, a motion to include another 125 acres of land, owned by the Monterey Corporation, in the District. The Monterey Corporation land was destined for the development of homes in the $45,000 to $49,000 price range compared to the $33,900 price projected by Heritage Homes.

The meeting was attended by a larger crowd than usual with eighty to eighty-five Water District members present. When Roger DesVergnes arrived with his brother they sat in the last row of seats. From there they were able to overhear various conversations in which the voters were discussing among themselves the Heritage Homes project. The gist of these conversations was that the builder was planning to put in "Section 232" housing; that the project would bring in

black people from nearby East Providence; that Water District members would have to sell their houses at a loss because they didn't want colored people in Seekonk; and that the subdivision must be stopped if the voters were to protect the value of their property.

When Article 17 was reached it was read aloud by water commissioner James Olean who recommended that the voters act favorably on it. He advised those present that there was enough water to service both the Heritage Homes property and the property of Monterey Corporation described in Article 18. He moved for the approval of Article 17 and his motion was seconded. The floor discussion of Article 17 lasted twenty-five to thirty minutes with a number of voters speaking against it and none in favor of it. It became apparent that many had attended the meeting for the sole purpose of defeating Article 17. One speaker said that he understood that the houses proposed by Heritage Homes would bring black people to the area. Another man asked where the builder was. When DesVergnes understandably hesitated to identify himself the man demanded to see the builder who planned "to put up this low income housing in this town." DesVergnes then stood up but when he was asked by the same voter "What kind of shacks are you going to build in this town?" DesVergnes lost his temper and responded that it was none of the questioner's business. DesVergnes then left the meeting. The voters defeated Article 17 by a vote of sixty-six to eight.

According to District records no one else has ever been denied inclusion in the Water District in its thirty-two year history. The Superintendent testified that voter acceptance would have benefitted the voters economically. The water commissioners who testified could not explain why Article 17 was voted down.

Immediately after the defeat of Article 17, forty-three voters left the meeting. Those who remained approved Article 18 to expand the District so as to include therein the land of Monterey Corporation.

After leaving the Water District meeting the DesVergnes brothers were scheduled to appear before the Seekonk planning board in a routine building permit application. Quite a few people arrived before them and asked many questions about the Heritage Homes project. As a result the Planning Board had some difficulty keeping the meeting in order. When the DesVergnes brothers arrived they were followed by a large group of people many of whom had come directly from the Water District meeting. The meeting hall was not big enough to hold the crowd.

Jean Nelson, owner of the Monterey Corporation, testified that there was a group of Fieldwood residents at the meeting who were members of an organized neighborhood telephone network designed to "get out the vote" on certain issues. She testified that one woman appeared to be leading that group. People in the rear of the hall were overheard to say "We stopped him at the Water District and we'll stop him here." A woman who did not recognize Roger DesVergnes and his brother told them "if we don't stop this thing here tonight . . . you will have all the niggers in town." Those attending the meeting were informed by the Chairman of the Planning Board that approval of the application was a routine Planning Board procedure.

At some point after May 11, 1976 the Planning Board issued the building permits. Because it had been denied inclusion in the Water District Heritage Homes proceeded to construct only the seven houses on Miller Street for which it had been advised that inclusion in the District was unnecessary because the existing main could be tapped. Construction of five of the seven houses was financed with loans from the

Taunton Cooperative Bank. The other two were built with Heritage's own funds. Within three to four weeks Heritage had the seven houses completely framed. Five of them had been completed through the plastering stage. Two were closed, roof-tight, plumbing in and ready for plastering. Money had been drawn out on the five construction loans and Heritage's own funds had been put into the other two houses.

At about that time DesVergnes learned that Heritage Homes would not be allowed to tap the existing water lines and that the promised water would not be available. Superintendent Wilbur told him that a mistake had been made and that the seven houses could not have water unless they were within the District although three other houses on the same side of Miller Street as those houses and not within the District had been allowed to tap the same existing main. Heritage had already found buyers for all seven of the houses.

Heritage Homes made four subsequent applications for inclusion in the water district. The first three were denied and it was refused a hearing on the fourth. After the third denial in December, 1976 Heritage Homes investigated alternative sources of water. It hired a consultant to investigate the possibility of digging one artesian well to service a number of homes. By the spring of 1978 after three test holes had been drilled it was determined that the water supply was inadequate to accommodate such a well. Heritage finally hired a well driller to drill individual wells for each lot.

However, while standing unoccupied for two years, the seven houses had been severely vandalized. As soon as the wells were drilled, Heritage repaired the damage and the seven houses were sold. Altogether Heritage Homes has built and sold thirty houses on the street frontage portion of its property.

I find based on *overwhelming* evidence that the Water District's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations. In making this finding I am particularly mindful that in the thirty-two year history of the District no other applicant ever has been refused admission and that all the factors usually considered important in making such a determination favored a decision opposite to the one reached by the water district.

DAMAGES

During the two year delay in construction and sales which resulted from the racially discriminatory acts of the Seekonk Water District, plaintiff claims that it suffered damages of $169,325.70 as follows:

Vandalism	$ 14,000.00
Interest on construction loans	17,095.31
Real estate taxes on lots	4,366.51
Real estate taxes on land	14,573.87
Interest on land loan	47,124.57
Installing wells	72,165.44
Total:	$169,325.70

I rule that the $47,124.57 in interest paid on plaintiff's land loan should be excluded and that the amount should be further reduced by $28,475.00 which is the amount that Heritage Homes would have paid to supply the thirty houses with water if they had been rightfully included in the Water District.[1] The amount should be further reduced by that portion of the real estate taxes which is attributable to the undeveloped acreage that plaintiff still owns.

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[1] Roger DesVergnes testified that if included in the district it would have cost only $125,000 to provide the seven houses on Miller Street with water and $1,200.00 for each of the other lots.

On the basis of the foregoing I find that the additional cost to plaintiff which resulted from the wrongful acts of the Water District was actually less than $100,000. I further find that by upping the sale price of the thirty houses from the original price of $33,900.00, plaintiff's receipts from its total sales have been increased by $248,840.00.[2]

Clearly therefore even if inflationary factors were to be considered, plaintiff has effectively passed its losses on to the buyers of its homes.

However such a distribution of losses should not result in a windfall to the Seekonk Water District. In order to discourage the obviously racially discriminatory policy of that district and as a warning to others, I therefore rule that the Seekonk Water District should pay $100,000.00 in punitive damages to the plaintiff.

I further rule that the District must extend its boundaries to include Heritage Homes property in the event that Heritage Homes or its successors should decide to continue its development in accordance with the zoning bylaws currently in effect. Heritage Homes is to file such an application within 30 days of the date of this opinion and if it does so, the District must expand its boundaries within 90 days from its receipt of such a request in writing from Heritage Homes.

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[2] Roger DesVergnes testified that plaintiff's sales total $1,265,840.00 while total sales at the original price would have been $1,017,000.00.

Appendix.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

Nos. 80-1646, 80-1704.

United States Court of Appeals,
First Circuit,

Argued Feb. 13, 1981.

Decided March 31, 1981.

As Amended by Order Dated
May 18, 1981.

John J. Graham, Boston, Mass., with whom William E. Hickey, Quincy, Mass., was on brief, for Seekonk Water Dist.

Stephen D. Clapp, N. Attleboro, Mass., with whom Armstrong, Pollis & Clapp, N. Attleboro, Mass., was on brief, for Heritage Homes of Attleboro, Inc.

Before COFFIN, Chief Judge, ALDRICH, Circuit Judge and WYZANSKI, District Judge.*

COFFIN, Chief Judge.

This case returns to us after the district court found that there was overwhelming evidence to support the allegations that we previously found to have stated a claim. *See Des Vergnes v. Seekonk Water District*, 601 F. 2d 9 (1st Cir. 1979). Heritage Homes is a corporation engaged in real estate development. It sued the defendant Seekonk Water District for refusing—because Heritage was willing to sell homes to black persons—to include a Heritage development within the District and thus to supply the development with water. The district court found the District liable under 42 U.S.C. §§ 1981 and 1983. It refused to award Heritage compensatory damages because "plaintiff has effectively passed its losses on to the buyers of its homes." Nonetheless it awarded $100,000.00 in punitive damages against the District "[i]n order to discourage the obviously racially discriminatory policy of the District." Both sides appeal. Since the nature of the claim is explained in our earlier opinion, here we add only such facts as become necessary to explain our reasoning.

Considering first the District's appeal, we briefly respond to those arguments by the District that merit comment. First, we have previously decided the District's arguments drawn from *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). *See* 601 F. 2d at 13.

Second, the District asserts that, because the actions of the Town Planning Board are not within the control of the Dis-

* Of the District of Massachusetts, sitting by designation.

trict, the district court's reference to events at a Board meeting was "immaterial." The Board meeting took place immediately following a District meeting. Both were forums for expressions of hostile and incriminating opinion against Heritage's real estate development. Such circumstances permit an inference that persons opposing the development left the earlier meeting to attend the later one. Community attitudes and events can become relevant when "the acts of voters 'may fairly be said to represent official policy.' " 601 F. 2d at 15. Ironically, elsewhere in its brief the District criticizes the district court for failing to appreciate "the necessity for considering much more than random scraps of a [District] proceeding to determine what happened." We do not think that the district court erred by referring to the entire context to assess the plaintiff's charge of racial motivation.

Third, the District claims that evidence of statements made at the District meeting was hearsay and thus improperly admitted. With one exception, the District did not object to the admission of this evidence. The single exception related to evidence that was offered on at least two other occasions without objection. We thus review for plain error, and have difficulty in finding any error at all. Our examination of these statements indicates that they were not offered to prove the truth of the matters they assert. For instance, one witness testified to hearing a person at the meeting state the developers would "bring all of the black people from East Providence to this project." Such statements demonstrate that those at the meeting made or heard racially hostile remarks prior to voting against the real estate development. *See* Fed. R. Evid. 801(c) & 803. The fact, not the truth of the assertion, is the critical element. The District's other evidentiary arguments either are inconsequential or seek to retry disputes of fact whose resolution is properly within the discretion of the finder of fact.

Fourth, the District's argument that its "decisionmaking process . . . is . . . not subject to evaluation" is foreclosed by *Owen v. Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (no qualified immunity for § 1983 municipal defendants), since the District does not explain how it differs from a municipality for this purpose.

Finally, the odious character of the discrimination in this case is a sufficiently "aggravating circumstance[ ]" *Fact Concerts, Inc. v. Newport*, 626 F. 2d 1060, 1067 (1st Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 782, 66 L.Ed.2d 603 (1980), to support the award of punitive damages. The record in this case was adequate to permit the finder of fact to conclude that the District engaged in a deliberate and remarkably overt display of racial discrimination. Although we share our dissenting brother's concern that courts ought not too quickly levy punitive damages against public bodies, we are struck by the thought that insulating such bodies (even where the improper motive, as here, is "overwhelmingly established") would result in allowing the most blatant discrimination to avoid the risk of punitive damages so long as there is open participation, while punishing only minions who act beyond the confines of council rooms. This would be a particularly ironic result in cases where actual damages are trivial, as they often are in cases of racial discrimination.

Turning to Heritage's appeal on its injury award, we note that it suffered two types of damages due to the District's discrimination: increased water supply costs and an approximate two year delay from 1976 to 1978 in developing the housing investment. The former cost arose from the need to drill private wells for each lot instead of simply connecting each to the District's water supply. The latter resulted from Heritage's efforts to persuade the District to admit it and, this failing, from its search for an adequate alternative water supply.

The first cost is measured by subtracting the expense to which Heritage would have been put in connecting with the District from the total cost of drilling the individual wells. The district court figured this cost to be $43,690.44 (calculated by subtracting $28,475.00 from $72,165.44). Heritage does not challenge this sum.

The second alleged cost arises from the fact that Heritage was forced to invest in assets during a time when it would have preferred to complete its development and sell out. This asserted damage would be the value attributed to the loss of use of the funds during the period when Heritage was reasonably precluded from selling the property. The conventional measure is the appropriate interest rate. In this case, assuming that Heritage moved with reasonable diligence to obtain the alternative water supply, the record lacks not only evidence of the appropriate interest rate but, more importantly, evidence that the appreciation in value of the property over the entire period was less than what interest on the amount invested would have yielded. We therefore have no alternative but to hold that compensatory damages attributable to loss of use of money were not proven.

Heritage consequently has succeeded in proving actual damages of $43,690.44. Its failure to prove more simply confines the award to this sum, and does not, as the district court thought in its "passing on losses" analysis, cancel out the damages that Heritage *has* demonstrated.

Finally, Heritage requests prejudgment interest on its compensatory damages. It acknowledges that prejudgment interest in civil rights cases is not mandatory in this circuit. *Furtado v. Bishop*, 604 F. 2d 80, 98 (1st Cir. 1979). It argues, however, that prejudgment interest is required to make injured parties whole when the injuries they suffer are not "intangible." *Id.* at 97. We agree, noting that this normally will be a matter within the sound discretion of the district court

and that "in appropriate circumstances compensatory principles must be tempered by an assessment of the equities." *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F. 2d 239, at 242 (8th Cir. 1981). Since the equities of this case do not mandate further tempering, we remand this case to the district court for entry of an award of $43,690.44 plus prejudgment interest on compensatory damages. In all other respects the district court's judgment is *affirmed.* Plaintiff is awarded costs, to include counsel fees in this court, the amount of the latter to be determined by the district court in connection with the pending motion for fees in that court.

ALDRICH, Senior Circuit Judge (dissenting in part).

I agree with the court that the District's improper motive was overwhelmingly established. In this circumstance this is a classic case for considering punitive damages in the true punitive sense. However, I am troubled by the concept that beneficial owners, or customers, of a quasi public utility, or the taxpayers in a municipality, should be punished for actions over which they had, at best, only remote control. A few of the members of defendant District voted against this particular conduct; it appears that most did not vote at all. Nevertheless, the court, bringing to fruition its indication in *Fact Concerts v. City of Newport*, ante, would have these members extensively punished, when their very maximum offense would seem to be negligence. I would think the burden of compensatory damages and attorney's fees enough.

Alternatively, this type of case does not seem to me an appropriate medium to further the deterrent aspect of punitive damages. I wonder how likely this example will serve to get out the voters in some other, unconnected, organization and make them "vote right."

Finally, punitive damages is a highly subjective matter. However improper the conduct in the present case, it is not to be overlooked, when considering the applicability of the principle to this type of defendant, that the mere possibility that some jury may award punitive damages may have a more deterrent effect upon the freedom to vote than that freedom should be burdened with. In sum, I share the thoughts of the district court in *Valcourt v. Hyland*, D.Mass., 1980, 503 F. Supp. 630, 637-40, and would vacate the punitive damage award.

United States Court of Appeals
For the First Circuit

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,
v.
THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

No. 80-1704

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,
v.
THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

ON REMAND FROM THE SUPREME COURT

Before
COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
WYZANSKI, *Senior District Judge.**

Stephen D. Clapp and *Armstrong, Pollis and Clapp* on memorandum on remand for Heritage Homes of Attleboro, Inc.
William Hickey, John J. Graham, Fred M. Vinson, Jr., Kenneth C. Bass, III, and *Reasoner, Davis & Vinson* on memorandum on remand for the Seekonk Water District.

January 25, 1982

COFFIN, *Chief Judge.* When we last considered this protracted case we upheld the district court's finding that

* Of the District of Massachusetts, sitting by designation.

Seekonk Water District had violated 42 U.S.C. §§ 1981 & 1983, modified its holding that Heritage Homes had failed to prove compensatory damages, and affirmed its award of punitive damages against the District. 648 F.2d 761 (1st Cir. 1981). Subsequently, in *City of Newport* v. *Fact Concerts, Inc.*, 49 U.S.L.W. 4860 (June 26, 1981), the Supreme Court held that a municipality is immune from punitive damages under 42 U.S.C. § 1983. On petition for a writ of certiorari, the Court vacated our prior judgment in this case and remanded it to our court "for further consideration in light of" *Fact Concerts*. We now reverse the district court's award of punitive damages against the Water District, a municipal corporation under state law, but reaffirm all other aspects of our prior opinion.

Heritage Homes makes two arguments on remand. First, it stresses that *Fact Concerts* involved the bad faith actions of public officials whereas the present case deals with the malicious conduct of the voting taxpayers themselves. Second, it argues that *Fact Concerts* dealt with municipal immunity under § 1983 and that both the history and policy underlying § 1981, which is an alternative cause of action in this case, preclude municipal immunity.

As support for its first argument, Heritage Homes claims that this case falls within the Court's caveat that punitive damages might be available against a municipality in "an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." *Fact Concerts, supra*, 49 U.S.L.W. at 4865 n.29. Although the finding of the district court that there was "overwhelming" evidence that the Water District was motivated by racial considerations seems to us well supported by its account of the blatantly racial discussions that took place preceding the vote to exclude Heritage Homes from the District, we conclude that the facts of this case do not fit into any exception that the Court is likely to carve out of its broad holding that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 4866. Of the

thousands of members of the Water District,[1] only some 80 to 85 attended the crucial meeting. Of these 66 voted to exclude and 8 voted to include Heritage Homes. Absent widespread knowledgeable participation by taxpayers, the analogy to municipal officials seems apt: to award punitive damages against the Water District would not serve the purposes of punishment or deterrence. As the Court observed, "blameless or unknowing" taxpayers would be punished by imposing punitive damages here. The actions of a small claque of voters would burden several thousand non-participants, many of whom presumably were unaware of the entire controversy.

If the theory is that most of the taxpayers knew that a group of voters intended to discriminate but wanted to disassociate themselves by staying away from the meeting, this raises a number of troubling questions. How much did they know? How serious was the threat? When must a citizen or taxpayer attend a meeting or remain away, vote or abstain, at his or her peril? Without a more compelling showing, we have no doubt that the Court would reaffirm its reasoning that "[n]either reason nor justice suggests that ... retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 4865.

With respect to the reality of deterrence, the chance that 66 voters would be deterred at a meeting by the knowledge that punitive damages, if finally assessed, would be shared by several thousand taxpayers, is as much "deterrence in the air" as imposing punitive damages against a municipality for the actions of its officials. Awarding punitive damages

[1] The precise number of residents in the District is not clear from the record. In its Memorandum on Remand, the Water District states that it had 13,500 residents at the time; but from the record it appears that 13,500 is the population of the Town of Seekonk, of which the Water District comprises only a portion. Heritage Homes has not objected to the assertion by the Water District, nor has it provided its own figure. The exact number of members of the District is not crucial to our holding, though this might be a different case were there only 100 members instead of several thousand.

against the offending voters would seem to be "a more effective means of deterrence." *Id.* Moreover, the argument that punitive damages would encourage nonvoting taxpayers to participate and oppose actions which violate the Constitution is not persuasive in the absence of proof of broad public awareness that malicious conduct is very likely to take place. And the same series of expansive questions recognized in connection with punishment must also be confronted here.

Heritage Homes' second argument is that any municipal immunity under § 1983 should not apply to violations of § 1981. In light of *Fact Concerts* we conclude that "both history and policy" support municipal immunity from punitive damages under § 1981. While § 1981 was enacted five years earlier than § 1983, Heritage Homes has failed to point to any legislative history, nor are we aware of any, which indicates that Congress intended to overturn the common law rule that municipal liability "did not extend to the award of punitive or exemplary damages."[2] *Id.* at 4865. Even the proposal in 1871, embodied in the rejected Sherman amendment, to extend municipal liability for *compensatory* damages met with resistance; and its supporters specifically disavowed the goal of punishment for a governmental entity. We add that, had Congress crossed any Rubicon of municipal punitive liability five years earlier in connection with § 1981, this fact would most probably have surfaced in the 1871 debate.

However strong the policies underlying § 1981, our earlier analysis indicates that imposing punitive damages against the Water District would not serve to punish or deter the responsible actors. We are not only bound by the holding of *Fact Concerts* but must also defer to its reasoning; and the Court's discussion of the rationale for levying punitive damages leaves no room for distinguishing § 1981 from

[2] While the one jurisdiction (New Hampshire) which had awarded punitive damages against a municipality before 1866 had reversed itself in 1870, we doubt that this change would alter the Court's view that the common law generally provided immunity from such damages, even in 1866.

§ 1983. *See id.* at 4865-66. In particular, the Court's concern with not imposing huge financial burdens on municipalities is equally applicable to § 1981. While in the aggregate there may be fewer suits under § 1981 than under § 1983, the Court's reasoning applies even to a single case like this one: since the unlimited taxing power of a municipality can be taken into account in fashioning the amount of punitive damages, there is a likelihood of extremely large awards which would not only strain local treasuries but might also curtail public services. "Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk." *Id.* at 4866.

We are aware that at least one court has accepted the argument that *Fact Concerts* should not be construed to apply to § 1981. *Boyd* v. *Shawnee Mission Public Schools*, No. 78-2080 (D. Kan. Sept. 23, 1981). We are not persuaded by its reasoning. The district court in *Boyd* relied in part on its view that the federal courts have traditionally treated §§ 1981 and 1983 "as totally distinct and as independent causes of action." While at one time courts had held municipalities liable under § 1981 in spite of the Court's holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipalities enjoyed absolute immunity under § 1983, this different treatment was based upon the explicit language of the statutes: § 1983 stated that no "person" shall deprive another of federal rights, and a municipality was not thought to be a "person" for this purpose, whereas § 1981 contains no similar limitation. *See Sethy* v. *Alameda County Water Dist.*, 545 F.2d 1157, 1159-60 & n.5 (9th Cir. 1976). In any case, *Monroe* has since been overruled so that municipalities no longer enjoy blanket immunity under either provision. *See Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

The district court also relied upon the Supreme Court's dictum in *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975), that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief,

including . . ., under certain circumstances, punitive damages." The two cases cited for this proposition, *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S 940 (1968), and *Mansell* v. *Saunders*, 372 F.2d 573 (5th Cir. 1967), both held that punitive damages could be imposed against government officials for violations of § 1983; neither case involved a suit against a municipality or mentioned § 1981. The Court's citation of these cases thus implies that it equates the analysis of punitive damages under the two provisions, which in light of *Fact Concerts* casts grave doubt on the validity of the dictum as applied to municipalities.

We therefore reverse that part of the district court's judgment awarding punitive damages against the Seekonk Water District. Since the rest of our prior opinion is unaffected by the Court's holding in *Fact Concerts*, we reaffirm our other conclusions.

No costs to be assessed for this phase of the proceedings. Other costs and counsel fees are to be awarded to plaintiff as we indicated in our prior opinion.

Adm. Office, U.S. Courts — Addison C. Cardwell & Son, Inc.

Mass. Acts of 1945, c. 381

Chap. 381 AN ACT ESTABLISHING THE SEEKONK WATER DISTRICT OF SEEKONK.

Be it enacted, etc., as follows:

SECTION 1. The inhabitants of the town of Seekonk liable to taxation in said town and residing within the territory comprised within the following boundaries, to wit: Beginning at a point where the town boundaries between Pawtucket, Rhode Island, Seekonk and Attleboro, Massachusetts. — Seekonk intersect at the extreme northwest portion of Seekonk, thence southerly 7.3 miles along the boundary between Pawtucket and East Providence in Rhode Island and Seekonk to a point 1,000 feet south of Highland avenue: thence running southeasterly 4,400 feet parallel to Highland avenue to the center line of Mink street; thence southeasterly 4,000 feet to the center line of Warren avenue at a point approximately

400 feet south of Fall River avenue; thence southeasterly 2,200 feet to a point opposite the easterly line of Wheaton street, and 200 feet south of Fall River avenue; thence 450 feet northeasterly along the east line of Wheaton avenue; thence northwesterly 3,200 feet to the center line of Anthony street at a point 400 feet north of Fall River avenue; thence northwesterly 6,200 feet to the center line of Cole street, at a point 250 feet east of Fall River avenue; thence northeasterly 3,500 feet to the center line of County street at a point 1,700 feet west of Olney street; thence 3,200 feet to the center line of Arcade avenue at a point 1,300 feet northeast of the intersection of Fall River avenue; thence northeasterly 5,500 feet to the center line of Elm street at a point 550 feet south of Taunton avenue; thence easterly 5,850 feet to the town boundary between Rehoboth and Seekonk at a point 250 feet south of Taunton avenue; thence due north 2,700 feet along the Rehoboth-Seekonk boundary to a point 300 feet north of Jacobs street; thence southwesterly 2,900 feet to a point 300 feet east of Prospect street and 550 feet north of the intersection of Lincoln and Jacobs streets; thence northerly 1,800 feet parallel to Prospect street; thence southwesterly 600 feet, crossing Prospect street at a point 1,300 feet south of Walnut street; thence southerly 2,200 feet parallel with Prospect street; thence westerly 2,300 feet to the center line of Greenwood avenue at a point 300 feet north of Ledge road; thence due north 1,400 feet; thence northwesterly 3,900 feet to the center line of Woodward avenue at a point 2,100 feet east of Coolidge street; thence northerly 2,850 feet to the center line of Walker street at a point 1,800 feet west of Prospect street; thence northerly 1,300 feet to the center line of Read street at a point 1,800 feet east of Newman avenue; thence northerly 3,300 feet to the center line of Brown avenue at a point 1,850 feet northeast of Newman avenue; thence northerly 6,700 feet to the center line of Pine street at a point 350 feet north of Woodland avenue; thence northeast-

erly 6,400 feet parallel to the east boundary line of New York, New Haven and Hartford Railroad property to the boundary between Seekonk and Attleboro at a point 3,200 feet west of northeast corner boundary of Seekonk, Rehoboth and Attleboro; thence westerly 7,400 feet along the boundary between Seekonk and Attleboro to the point of beginning, shall constitute a water district and are hereby made a body corporate by the name of the Seekonk Water District, hereinafter called the district, for the purpose of supplying themselves with water for the extinguishment of fires and for domestic and other purposes, with power to establish fountains and hydrants, and to relocate and discontinue the same, to regulate the use of such water, and to fix and collect rates to be paid therefor, to assess and raise taxes as provided herein for the payment of such services, and to defray the necessary expenses of carrying on the business of said district, but subject to all general laws now or hereafter in force relating to such districts, except as otherwise provided herein. Said district shall have power to prosecute and defend all actions relating to its property and affairs.

SECTION 2. For the purposes aforesaid, the district, acting by and through its board of water commissioners hereinafter provided for, may contract with any municipality, acting through its water department, or with any water company, or with any other water district, for whatever water may be required, authority to furnish the same being hereby granted, and may enter into such other contracts as may be necessary for the purposes set forth in section one of this act and may take by eminent domain, under chapter seventy-nine or chapter eighty A of the General Laws, or acquire by lease, purchase or otherwise, and hold, the waters, or any portion thereof, of any pond, spring or stream, or of any ground sources of supply, by means of driven, artesian or other wells, within said town of Seekonk not already appropriated for the

purposes of a public water supply, and the water rights connected with any such water sources; and for said purposes may take as aforesaid, or acquire by purchase or otherwise, and hold, all lands, rights of way and other easements necessary for collecting, storing, holding, purifying and preserving the purity of the water and for conveying the same to any part of said district; provided, that no source of water supply or lands necessary for preserving the quality of the water shall be so taken or used without first obtaining the advice and approval of the state department of public health, and that the location and arrangement of all dams, reservoirs, wells, pumping, purification and filtration plants and such other works as may be necessary in carrying out the provisions of this act shall be subject to the approval of said department. The district may construct and maintain on the lands acquired and held under this act proper dams, wells, springs, reservoirs, standpipes, tanks, pumping plants, buildings, fixtures and other structures, including also the establishment and maintenance of filter beds and purification works or systems, and may make excavations, procure and operate machinery and provide such other means and appliances, and do such other things as may be necessary for the establishment and maintenance of complete and effective water works; and for that purpose may construct pipe lines, wells and reservoirs and establish pumping works, and may construct, lay, acquire and maintain aqueducts, conduits, pipes and other works under or over any land, water courses, railroads, railways and public or other ways, and along such ways, in said town, in such manner as not unnecessarily to obstruct the same; and for the purposes of constructing, laying, maintaining, operating and repairing such aqueducts, conduits, pipes and other works, and for all proper purposes of this act, the district may dig up or raise and embank any such lands, highways or other ways in such manner as to cause the least hin-

drance to public travel on such ways; provided, that the manner in which all things are done upon any such way shall be subject to the direction of the selectmen of said town. The district shall not enter upon, or construct or lay any aqueduct, conduit, pipe or other works within, the location of any railroad corporation except at such time and in such manner as it may agree upon with such corporation, or, in case of failure so to agree, as may be approved by the department of public utilities. Said district may enter upon any lands for the purpose of making surveys, test wells or pits and borings, and may take or otherwise acquire the right to occupy temporarily any lands necessary for the construction of any work or for any other purpose authorized by this act.

SECTION 3. Any person sustaining damages in his property by any taking under this act or any other thing done under authority thereof may recover such damages from the district under said chapter seventy-nine or said chapter eighty A; but the right to damages for the taking of any water, water right or water source, or for any injury thereto, shall not vest until water is actually withdrawn or diverted under authority of this act.

SECTION 4. For the purpose of paying the necessary expenses and liabilities incurred under this act, other than expenses of maintenance and operation, the district may borrow from time to time such sums as may be necessary, not exceeding, in the aggregate, three hundred and seventy-five thousand dollars; and may issue bonds or notes therefor which shall bear on their face the words, Seekonk Water District Loan, Act of 1945. Each authorized issue shall constitute a separate loan, and such loans shall be payable in not more than thirty years from their dates. Indebtedness incurred under this act shall be subject to the provisions of chapter forty-four of the General Laws pertaining to such districts.

SECTION 5. The district shall, at the time of authorizing said loan or loans, provide for the payment thereof in accordance with section four of this act; and when a vote to that effect has been passed, a sum which, with the income derived from water rates, will be sufficient to pay the annual expense of operating its water works and the interest as it accrues on the bonds or notes issued as aforesaid by the district, and to make such payments on the principal as may be required under the provisions of this act, shall without further vote be assessed upon the district by the assessors of said town annually thereafter until the debt incurred by said loan or loans is extinguished.

SECTION 6. Any land taken or acquired under this act shall be managed, improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interest of the district. All authority vested in said board by this section shall be subject to the provisions of section nine.

SECTION 7. Whenever a tax is duly voted by the district for the purposes of this act, the clerk shall send a certified copy of the vote to the assessors of said town, who shall assess the same on property within the district in the same manner in all respects in which town taxes are required by law to be assessed; provided, that no estate shall be subject to any tax assessed on account of the system of water supply under this act if, in the judgment of the board of water commissioners hereinafter provided for, after a hearing due notice whereof shall have been given, such estate is so situated that it can receive no aid in the extinguishment of fire from the said system of water supply, or receive no benefit in fire insurance grading therefrom, or both, or if such estate is so situated that the buildings thereon, or the buildings that might be constructed thereon, could not be supplied in any ordinary or reasonable manner with water from the said system; but all

other estates in the district shall be deemed to be benefited and shall be subject to such tax. A certified list of the estates exempt from taxation under the provisions of this section shall annually be sent by said board of water commissioners to said assessors, at the same time at which the clerk shall send a certified copy of the vote as aforesaid. The assessment shall be committed to the town collector, who shall collect said tax in the manner provided by law for the collection of town taxes, and shall deposit the proceeds thereof with the district treasurer for the use and benefit of the district. The district may collect interest on overdue taxes in the manner in which interest is authorized to be collected on town taxes.

SECTION 8. Any meeting of the voters of the territory included within the boundaries set forth in section one to be held prior to the acceptance of this act, and any meeting of the voters of the district to be held prior to the qualification of a majority of the water commissioners, shall be called, on petition of ten or more legal voters therein, by a warrant from the selectmen of said town, or from a justice of the peace, directed to one of the petitioners, requiring him to give notice of the meeting by posting copies of the warrant in two or more public places in the district seven days at least before the time of the meeting. Such justice of the peace, or one of the selectmen, shall preside at such meeting until a clerk is chosen and sworn, and the clerk shall preside until a moderator is chosen. At any meeting held hereunder prior to the acceptance of this act, after the choice of a moderator for the meeting the question of the acceptance of this act shall be submitted to the voters, and if it is accepted by a majority of the voters present and voting thereon it shall thereupon take effect, and the meeting may then proceed to act on the other articles in the warrant. After the qualification of a majority of the water commissioners, meetings of the district shall be called by warrant under their hands, unless some other method be provided by by-law or vote of the district.

SECTION 9. The district shall, after the acceptance of this act as aforesaid, elect by ballot, either at the same meeting at which this act shall have been accepted, or thereafter, at an annual meeting or at a special meeting called for the purpose, three persons, inhabitants of and voters in said district, to hold office, one until the expiration of three years, one until the expiration of two years, and one until the expiration of one year, from the day of the next succeeding annual district meeting, to constitute a board of water commissioners; and at every annual district meeting following such next succeeding annual district meeting one such commissioner shall be elected by ballot for the term of three years. The date of the next annual meeting shall be fixed by by-law or by vote of the board of water commissioners, but in no event shall it be later than fifteen months subsequent to the date on which the water commissioners were first elected. All the authority granted to said district by this act, except sections four and five, and not otherwise specifically provided for, shall be vested in said board of water commissioners, who shall be subject, however, to such instructions, rules and regulations as the district may by vote impose. At the meeting at which said water commissioners are first elected and at each annual district meeting held thereafter, the district shall elect by ballot, each for a term of one year, a clerk and a treasurer of the district. The treasurer shall not be a water commissioner, and shall give bond to the district in such an amount as may be approved by said water commissioners and with a surety company authorized to transact business in the commonwealth as surety. A majority of said water commissioners shall constitute a quorum for the transaction of business. Any vacancy occurring in said board from any cause may be filled for the remainder of the unexpired term by said district at any legal meeting called for the purpose. No money shall be drawn from the treasury of the district on account of its

water works except upon a written order of said water commissioners or a majority of them.

SECTION 10. Said board of water commissioners shall fix just and equitable prices and rates for the use of water, and shall prescribe the time and manner of payment. The income of the water works shall be appropriated to defray all operating expenses, interest charges and payments on the principal as they shall accrue upon any bonds or notes issued under authority of this act. If there should be a net surplus remaining after providing for the aforesaid charges, it may be appropriated for such new construction as said water commissioners may recommend, and in case a surplus should remain after payment for such new construction the water rates shall be reduced proportionately. Said water commissioners shall annually, and as often as the district may require, render a report upon the condition of the works under their charge, and an account of their doings, including an account of receipts and expenditures.

SECTION 11. The district may adopt by-laws prescribing by whom and how meetings of the district may be called, notified and conducted; and, upon the application of ten or more legal voters in the district, meetings may also be called by warrant as provided in section eight. The district may also establish rules and regulations for the management of its water works, not inconsistent with this act or with any other provision of law, and may choose such other officers not provided for in this act as it may deem necessary or proper.

SECTION 12. Whoever wilfully or wantonly corrupts, pollutes or diverts any water obtained or supplied under this act, or wilfully or wantonly injures any reservoir, well, standpipe, aqueduct, pipe or other property owned or used by the district for any of the purposes of this act, shall forfeit and pay to the district three times the amount of damages assessed therefor, to be recovered in an action of tort, and upon con-

viction of any of the above wilful or wanton acts shall be punished by a fine of not more than three hundred dollars or by imprisonment in jail for not more than one year, or both.

SECTION 13. Upon a petition in writing addressed to said board of water commissioners requesting that certain real estate, accurately described therein, located in said town and abutting on said district and not otherwise served by a public water supply be included within the limits thereof, and signed by the owners of such real estate, or a major portion of such real estate, said water commissioners shall cause a duly warned meeting of the district to be called, at which meeting the voters may vote on the question of including said real estate within the district. If a majority of the voters present and voting thereon vote in the affirmative the district clerk shall within ten days file with the town clerk of said town and with the state secretary an attested copy of said petition and vote; and thereupon said real estate shall become and be part of the district and shall be holden under this act in the same manner and to the same extent as the real estate described in section one.

SECTION 14. This act shall take full effect upon its acceptance by a majority vote of the voters of the territory included within said district by section one of this act present and voting thereon by the use of a check list at a district meeting called, in accordance with the provisions of section eight, within four years after its passage, but not otherwise.

Approved June 1, 1945.

Opposition

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No. 81-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HERITAGE HOMES OF ATTLEBORO, INC.,
Petitioner,

v.

THE SEEKONK WATER DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Whether punitive damages can be awarded against a municipal corporation under 42 U.S.C. § 1981.

2. Whether the Court of Appeals correctly applied the decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. ____ (1981), to the facts of this case.

PARTIES BELOW

The parties are correctly stated in the petition.

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OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The opinions below, jurisdiction and statutes involved are correctly stated in the petition.

STATEMENT OF THE CASE

This case was previously considered by the Court at the beginning of the 1981 Term in docket number 80-2172. In that case the Court granted the Water District's petition for a writ of certiorari, vacated the judgment of the Court of Appeals which had upheld an award of punitive damages and remanded the case for re-consideration in light of the decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. ____ (1981). On remand the Court of Appeals held that the decision in *Newport*

applied with equal force in this case and that punitive damages could not be recovered against the Water District. The Court of Appeals passed on both of the arguments advanced in the petition and rejected them. Those same arguments had previously been advanced by the petitioner in its opposition to the petition for certiorari in No. 80-2172.[1]

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly interpreted this Court's decision in *Newport*. The decision below is correct. It does not conflict with the decision of any other circuit court. The Court of Appeals' holding that punitive damages are not recoverable against a municipal corporation in a § 1981 action is consistent with the decision of the district court in *Ferguson* v. *Joliet Mass Transit Dist.*, 526 F.Supp. 222 (1981), although it is not consistent with the district court decision in *Boyd* v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (D.Kan. 1981). That difference in opinion at the district court level need not be addressed at this time by this Court. It can be expected that the various courts of appeals will resolve any inconsistencies at the district court level and that intervention by this Court would be unnecessary. The *Boyd* decision, coming only 3 months after the *Newport* decision and 4 months before the Court of Appeals' decision in this case, will not necessarily be followed by other courts. Indeed, the *Boyd* decision has been considered and explicitly rejected by the Court of Appeals in this case and the district court in the *Ferguson* case. Intervention by this Court to resolve any conflict over the interpretation of the *Newport* decision would be premature.

The petitioner has previously argued in this Court and the Court of Appeals that this case is not controlled by *Newport*. *See*, Brief in Opp. to Pet. for Cert., No. 81-2172, at 10-11. Noting that the acts which resulted in liability here were those of a small group of taxpayers rather than those of governmental officials, Heritage argued that a footnote in the *Newport* opinion

[1] A more extensive statement of the case is set out in the Water District's conditional cross-petition for a writ of certiorari, No. 81-

distinguished this case. After discussing the public policy implications of subjecting municipalities to punitive damages and concluding that "neither reason nor justice suggest that such retribution should be visited on the shoulders of blameless or unknowing taxpayers," *Newport, supra*, 453 U.S.____, 101 S.Ct. at 2760, Mr. Justice Blackmun noted:

> It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. Nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here." *Id.* at n. 29.

Heritage seizes on that footnote and urges that the punitive damage award in this case should stand.

The Court's footnote does not imply that punitive damages are permissible under the facts of this case. The Court's holding in *Newport* was explicit and unqualified—punitive damages may not be awarded against a municipal corporation under § 1983. The dicta in the footnote did not qualify the holding, but was included only to show that the hypothetical situation was so unlikely that there was no necessity for a qualified holding, and that the ends of justice are better served by an absolute rule.

Moreover, (and even if the dicta in footnote 29 were to be read as qualifying the holding), the facts in this case do not warrant a different result from that in *Newport*. Although the discriminatory act in this case was that of a few voters, any punitive damage award would be borne by the "blameless" and "unknowing" taxpayers of the Water District. Less than 0.6% of the District's 13,500 residents voted against the Heritage petition. No racial animus can be attributed to the overwhelming majority of the voters who did nothing more than fail to vote. Only an insignificant minority of the taxpayers rejected the petition. While that act must be held legally binding on the District, it no more represents the acts of the taxpayers than did the illegal acts of the municipal officials in *Newport*. In both cases the illegal conduct was the product of individual activities of a numerically insignificant minority. In

neither case would it be reasonable or just to impose liability for punitive damages on the vast majority of innocent taxpayers.

This Court noted that issues of immunity under § 1983 should be approached in a two-part analysis by looking first to common law as it existed when the Civil Rights Act of 1871 was passed and then considering issues of public policy. *Newport, supra*, 101 S.Ct. at 2755-56. Both parts of that analysis show that punitive damages are not available here.

1. The Court noted that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying [punitive] damages against a municipal corporation." *Id.*, 101 S.Ct. at 2756, citations omitted. In the only apparent pre-1871 cases in which such damages were allowed, *Whipple* v. *Walpole*, 10 N.H. 130 (1839), *Wheeler* v. *Troy*, 20 N.H. 77 (1849), liability was not predicated on the acts of taxpayers but on the acts of town officials.[2]

2. The Court's public policy analysis does not justify punitive damages here. The Court held that "damages awarded for punitive purposes . . . are not sensibly assessed against the governmental entity itself," 101 S.Ct. 2760, since the wrongdoing is committed by the officials not the municipality. The same rationale applies here. The wrongdoing was committed by a few individual defendants who are not parties to the suit.[3] There is no basis in justice for attributing the consequences of their individual malice to all the taxpayers. Furthermore, there is no necessity to award punitive damages as a deterence to future acts by the Water District or its members. The compensatory damages allowed by this Court are a sufficient rebuke to the District and serve as a warning to future voters.

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[2] As noted by the Court, *Whipple* was specifically overruled in *Woodman* v. *Nottingham*, 49 N.H. 387 (1870).

[3] Three individual defendants originally named were dropped as parties by agreement between them and the petitioner.

Although the *Newport* decision discussed damages only under 42 U.S.C. § 1983, we submit that the same analysis applies to cases filed under 42 U.S.C. § 1981. That statute—like § 1983—does not provide for punitive damages, although courts have permitted such damage awards against private parties. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir. 1978); *Claiborne* v. *Illinois Cent. R.R.*, 583 F.2d 143, 153-54 (5th Cir. 1978); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876, 883-84 (8th Cir. 1977). These precedents do not apply where the defendant is a municipal corporation.

The issue under § 1981 should be determined by looking to the common law as it stood when the statute was enacted in 1866 and re-enacted in 1870.[4] As noted by this Court, "the courts that had considered the issue prior to 1871 were virtually unanimous in denying [punitive] damages against a municipal corporation." *Newport, supra*, 101 S.Ct. at 2756. By 1866, courts in at least 3 different jurisdictions had rejected punitive damages against municipal corporations. See *City Council of Montgomery* v. *Gilmer & Taylor*, 33 Ala. 116 (1858); *Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly N.P. 116 (1847); *M'Gary* v. *President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846). One jurisdiction allowed such damages. See *Whipple, supra*, *Wheeler, supra*. By 1870 an additional jurisdiction had ruled against such damages, *City of Chicago* v. *Langlass*, 52 Ill. 256 (1869), and the New Hampshire court which had allowed such damages expressly overruled its prior decisions. *See Woodman, supra*. Thus when the predecessor statute was re-enacted in 1870, the courts were unanimous in precluding punitive awards against municipalities.

The policy reasons which preclude such awards under § 1983 apply with equal force under § 1981. The courts have developed consistent principles in applying the Reconstruction Civil Rights Acts. Thus cases decided under § 1983 or § 1982

[4] 42 U.S.C § 1981 is derived from the act of May 31, 1870, c. 114, § 16, 16 Stat. 144, which re-enacted the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, following adoption of the Fourteenth Amendment.

have been drawn upon in deciding analogous issues under § 1981. *See Claiborne, supra,* at 154; *Allen, supra,* at 883-84. The *Newport* rule should be applied to cases brought under § 1981 as well as § 1983 both because the rational of that decision fits § 1981 as well as § 1983 and conflicting rules should not exist for substantially similar causes of action.

CONCLUSION

For the foregoing reasons, certiorari should not be granted to review this case. However, if this petition is granted, the Water District's conditional cross-petition should also be granted for the reasons set out in that petition.

Respectfully submitted,

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